STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee, / Cross-Appellant

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH ~~SERVICES, a Governmental agency of MACOMB COUNTY,~~

Defendant-Appellant / Cross-Appellee

and LIFE CONSULTATION CENTER, Defendant

Ok

Supreme Court No. _____

Court of Appeals No. 223829

Macomb Circuit No. 95-3319-CK

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PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANT

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STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant filed its Application for Leave to Appeal on April 18, 2002. Plaintiff, Sharda Garg, timely seeks leave to appeal as Cross-Appellant, seeking review of the Court of Appeals decision of March 29, 2002 (No. 223829; Exhibit A), to the extent that the Court of Appeals affirmed the trial court's Opinion dated August 6, 1998 regarding calculation of prejudgment interest (Exhibit B), and the Order of Judgment entered August 17, 1998 which embodies that ruling (Exhibit C). The Circuit Court's and the Court of Appeals' ruling on this issue is contrary to the plain and unambiguous language of the controlling statutes (see: Argument, *infra*). This Court should grant leave to appeal, reverse those rulings, and order interest running from commencement of this action.

STATEMENT OF QUESTION PRESENTED

SHOULD INTEREST ON PLAINTIFF'S DAMAGES BEGIN TO RUN FROM THE DATE OF FILING THE COMPLAINT, WHERE THOSE DAMAGES ARE NOT "FUTURE DAMAGES" WITHIN THE MEANING OF MCLA § 600.6013?

Plaintiff/Cross-Appellant says "YES".

Defendant/Cross-Appellee says "NO".

The Trial Court and the Court of Appeals say "NO".

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STATEMENT OF FACTS

Defendant has sought leave to appeal from a Court of Appeals opinion (No. 223824; 3/29/02) (Exhibit A), affirming a judgment on a jury verdict in favor of Plaintiff, Sharda Garg, on her claim of retaliation under the Elliott-Larsen Civil Rights Act ("ELCRA"), MCLA § 37.2701(a). Plaintiff seeks review of the trial court's ruling that interest on future damages awarded to Mrs. Garg runs from the date of entry of judgment, rather than from the date the complaint was filed (Exhibits B, C).

Sharda Garg is an Asian Indian, British-educated and trained as a psychologist in India. Tr. 4/1/98, pp. 55, 57-59. She came to the United States having completed her Master's degree in psychology and all course work for her Ph.D. Id. at 59. Mrs. Garg became employed by Defendant-Appellant Cross-Appellee Macomb County Community Mental Health Services ("MCCMHS") in 1978 as a Staff Psychologist-Therapist II at its Life Consultation Center ("LCC") Tr. 4/1/98, p 76; Tr. 4/6/98, pp. 319-320. From 1983 until 1998, she repeatedly sought to advance within the organization but was never promoted. Mrs. Garg testified about the many promotions she sought but did not receive after she opposed sexual harassment by her boss, and after she complained she was being discriminated against on the basis of color/national origin. See, for example, Tr. 4/1/98, pp. 95-96, 136-138, 150-151, 154; Tr. 4/2/98, pp. 14-20, 23-25, 27-28, 30-37, 40-45, 51-55, 61; Tr. 4/3/98, p. 137; Tr. 4/6/98, pp. 265-266. She attributed her lack of promotions to discrimination on the basis of color/national origin, retaliation for opposing such discrimination under ELCRA, and/or retaliation for opposing her boss' sexual harassment under ELCRA. Opinion and Order dated November 3, 1999, pp. 1-2.

Mrs. Garg testified to her wage loss and pension loss damages resulting from Defendant MCCMHS' retaliatory refusal to promote her over the years. Tr. 4/7/98, pp. 497-506. She also testified to the emotional damages caused by Defendant's treatment of her, which included

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feeling very depressed, less sociable, withdrawn, deeply hurt, shaken up, stressed out, unable to give emotionally to her husband and children, in emotional turmoil, and questioning whether she had made a mistake in coming to the United States. Tr. 4/6/98, pp. 286-294. She experienced headaches, sleeplessness, increased blood pressure, loss of appetite and weight loss, which she attributed to the emotional distress she suffered. Id. at 286-289, 292-293.

On April 23, 1998 after a lengthy trial, the jury awarded Mrs. Garg a verdict of $250,000.00 on her retaliation claim. Id. Judgment in the amount of $354,298.17 was entered in Mrs. Garg's favor on August 17, 1998, consisting of the jury's verdict, costs awarded under the ELCRA (MCLA § 37.2802), attorney fees under the mediation court rule, and some interest to date (Exhibit C).

Mrs. Garg argued that she was entitled to prejudgment interest on the entire amount of the money judgment pursuant to the prejudgment interest statute, MCLA § 600.6013(1) and (6), since none of the damages she sought or received were "future damages" as defined in the statute. (Plaintiff's Circuit Court Brief in Support of an Award of Interest on Plaintiff's Judgment from the Date of Filing, 6/10/98; Plaintiff's Supplemental Brief in Support of Plaintiff's Motion for Fees and Costs under the Elliot-Larsen Civil Rights Act and Interest on Elliot Larsen Attorney Fees and Costs, 5/21/98). Defendant MCCMHS took the position that the jury's award of future wage loss and pension loss damages, as well as a portion of the emotional distress damages award, were an award of "future damages" as defined in MCLA § 600.6301, and that plaintiff was therefore entitled to interest on those damages only from the date of entry of judgment. Relying only on an unpublished opinion, the trial court ruled that interest would commence as of the date of judgment on future emotional damages, future wage loss, and future

pension loss (Exhibit B; Opinion of 8/6/98; pp. 2-3). The trial court's Judgment embodies this ruling (Exhibit C).

The Court of Appeals also concluded that interest should run on the future damages only from the date of the judgment on the future damages portion of the award. The Court stated:

> "*** The plain language of MCL 600.6301 defines 'future damages' as damages resulting from bodily harm, sickness or disease. The instant Plaintiff testified that she suffered from headaches and high blood pressure as a result of the alleged discrimination. This clearly constituted 'bodily harm, sickness, or disease.' Therefore, the trial court correctly calculated the interest from the date of the judgment on the future damages portion of the award. We acknowledge that in Phinney [v Perlmutter, 222 Mich App 513], at 542, 562 [1997], and Paulitch v Detroit Edison Co., 208 Mich App 656, 661-663 [1995], this Court indicated that a plaintiff is entitled to prejudgment interest for future damages when the suit does not result from personal bodily injury. We find these cases sufficiently distinguishable from the instant case, however, because there was no indication in Phinney or Paulitch that the plaintiffs alleged physical manifestations resulting from discriminatory treatment." [Exhibit A; Court of Appeals' Opinion, at pp. 5-6].

The instant application for leave to appeal as Cross-Appellant timely follows Defendant's Application for Leave to Appeal (filed: 4/18/02).

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ARGUMENT

THE TRIAL COURT AND COURT OF APPEALS ERRED IN RULING THAT INTEREST ON $141,150 OF PLAINTIFF'S DAMAGES BEGINS TO RUN FROM THE DATE OF JUDGMENT, RATHER THAN FROM THE DATE OF FILING THE COMPLAINT, WHERE THOSE DAMAGES ARE NOT "FUTURE DAMAGES" WITHIN THE MEANING OF MCLA § 600.6013(1)

The trial court's award of interest pursuant to the prejudgment interest statute is subject to *de novo* review as it poses a question of statutory construction, by definition an issue of law. Haliw v Sterling Heights, 464 Mich 297, 302 (2001); Attard v Citizens Ins. Co., 237 Mich App 311, 319 (1999).

Relying only on an unpublished opinion of the Court of Appeals, the trial court agreed with MCCMHS, ruling that damages awarded for future wage loss, pension loss, and emotional distress in a civil rights case are "future damages" on which interest begins to run only as of the date of entry of judgment (Exhibit B). Thus, the trial court awarded interest only from the date of judgment on $141,150.00, representing $52,185 for future wage loss, $73,765 for future pension loss, and $15,000 attributed by the court to future emotional distress. Id., pp. 2-3.

MCLA § 600.6013 provides, in pertinent part:

> (1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on **future damages** from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "**future damages**" means that term as defined in section 6301.
>
> * * *
>
> (6) ...for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action **shall** be calculated at 6-month intervals **from the date of filing the complaint**....Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs..... [emphasis added].

"Future damages" is defined in MCLA § 600.6301(a) as:

> ...damages arising from **personal injury** which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering. [emphasis added].

"Personal injury" is, in turn, defined in MCLA § 600.6301(b) as "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm."

"A fundamental principle guiding this Court is that a clear and unambiguous statute leaves no room for judicial construction or interpretation." Coleman v Gurwin, 443 Mich 59, 65 (1993). Where the language is plain and unambiguous, the Court will follow it. Auto Club Insurance Association v Hill, 431 Mich 449, 454-455 (1988).

The interest statute provides that interest shall run from the date of commencement of the action, except as to "future damages", as to which interest runs from the date of the judgment. MCLA § 600.6013(1), supra. The Legislature expressly defined "future damages," however, as "that term is defined in [MCLA § 600.]6301." MCLA § 600.6013(1), supra. That definition includes only "damages arising from personal injury ..." MCLA § 600.6301(a), supra. None of Plaintiff's damages fit this definition, since none of her damages arise from "personal injury." Rather, her damages arise from Defendant's unlawful retaliation in violation of the ELCRA. While some of those damages are future lost wages, future pension loss, and future emotional distress, the fact that those damages arose from a civil rights violation rather than a personal injury means that the proscription of MCLA § 600.6013(1) as to interest on "future damages" does not apply.

In Paulitch v Detroit Edison Co, 208 Mich App 656 (1995), *lv gtd* 451 Mich 899 (1996), *vacated and lv den* 453 Mich 970 (1996), the jury awarded plaintiff $359,000 for defendant's

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failure to promote him on the basis of his age in violation of the Elliott-Larsen Civil Rights Act. The trial court denied plaintiff's motion for prejudgment interest. The Court of Appeals reversed:

> Plaintiff argues that the reference to future damages [in MCLA § 600.6013] is not applicable to this case because future damages, as defined in § 6301, must result from a personal bodily injury. MCLA § 600.6301; MSA 27A.6301. **Because this case involves a civil rights violation, plaintiff contends he is entitled to prejudgment interest on the money judgment from the date of the filing of the complaint, as provided by § 6013. We agree.** [208 Mich App, 661].

In Paulitch, the Court of Appeals interpreted the definition of "future damages" as follows:

> "We find there can be no interpretation of this plain language other than that a plaintiff is entitled to prejudgment interest when the suit does not result from a personal bodily injury." [208 Mich App at 662-663].

This is not a "personal injury" case. This is not a case in which Plaintiff's damages involve "bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm." MCLA § 600.6301(b), supra (emphasis added). The Court of Appeals' construction of these provisions in this case is not only contrary to that Court's prior decisions, but fails to give effect to the entirety of the statutory language. People v Morey, 461 Mich 325, 330 (1999).

Phinney v Perlmutter, 222 Mich App 513 (1997) involved successful claims of fraud and misrepresentation and retaliation under the Whistleblower's Protection Act, MCLA § 15.362. The Court of Appeals held that interest on all damages, including those damages sustained in the future, should run from the date of filing:

> Accordingly, we remand with instructions that the trial court recalculate prejudgment interest from the date of the filing of the first amended complaint [the first time Adelman, the W.P.A. defendant, was named as a defendant]. In addition, as held in issue XII, **plaintiff is entitled to prejudgment interest for future damages when the suit does not result**

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> **from personal bodily injury. Paulitch, supra, pp 662-663.** [222 Mich App, 562].

Most recently, the Sixth Circuit Court of Appeals addressed calculation of prejudgment interest under Michigan law in a breach of contract case:

> We are convinced Michigan law requires that prejudgment interest be calculated in this case on the entire judgment from the date that the complaint was filed. The prejudgment interest statute is remedial in nature and is to be construed liberally in favor of the prevailing party....Phinney v Perlmutter, 564 NW2d 532, 549 (Mich App 1997). The purpose of awarding statutory prejudgment interest is not only to compensate the prevailing party for the delay in the use of the money, but also to offset the costs of bringing the action and to provide an incentive for prompt settlement....**The statute must be applied in accordance with its plain terms.** *See* Paulitch v Detroit Edison Co., 528 NW2d 200 (Mich App 1995)....

Perceptron, Inc. v Sensor Adapt Machines, Inc., 221 F3d 913, 923 (CA 6, 2000) (emphasis added, some citations omitted).

Although Mrs. Garg attributed her emotional distress directly to the manner in which Defendant treated her, the trial court concluded "the emotional harm resulted from a bodily harm" because Mrs. Garg testified to such manifestations of her emotional distress as stomach problems, sleeplessness, erratic weight gain and loss, and high blood pressure (Exhibit B, p. 2). This conclusion is quite remarkable in that there was no medical testimony offered by either side, and no testimony at all that Mrs. Garg's emotional distress was **caused by** any bodily harm; in fact, Mrs. Garg testified that the opposite is true: her emotional distress caused her physical problems (Tr. 4/6/98, pp. 293-294).

The Court of Appeals, in deciding this issue, noted Plaintiff's testimony "that she suffered from headaches and high blood pressure as a result of the alleged discrimination," and concluded that this "clearly constituted 'bodily harm, sickness, or disease,'" within the meaning of MCLA § 600.6301(b) (Exhibit A; at p. 5). This conclusion is erroneous, for it splices off a

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mere portion of the definition of "personal injury" which appears in MCLA § 600.6301(b), which requires that in order to constitute "future damages" within the meaning of MCLA § 600.6301(a), the "personal injury", whether it consists of "bodily harm, sickness, disease, death, or emotional harm," must "resul[t] from bodily harm." MCLA § 600.6301(b), supra. The phrase, "resulting from bodily harm," relates to everything which precedes it within MCLA § 600.6301(b).

The Court of Appeals, realizing its obligation to follow its own prior, published opinions, MCR 7.215(I), sought to distinguish both Paulitch and Phinney, supra on the ground that in neither of those did "the plaintiffs alleg[e] physical manifestations resulting from discriminatory treatment" (Exhibit A, at p. 6). In fact, Phinney "presented two expert witnesses who testified that [she] suffered from posttraumatic stress disorder." 222 Mich App 513, 559. It is well known that the disorder often has physical manifestations, and that was certainly true in Phinney.[1]

The Court of Appeals, in its published decisions, has consistently refused application of the "future damages" definition to non-personal injury cases, including civil rights actions especially. Those decisions are correct, as they reflect a plain, unambiguous, full language which the Legislature employed.

[1] Dr. Phinney's appellate counsel was of the same firm representing this plaintiff. The Briefs in that case and the record therein show that Dr. Phinney, as a result of her posttraumatic stress disorder, had trouble sleeping, vomited repeatedly, cried uncontrollably, received various medications because she was shaking and trembling and found herself unable to care for her infant children, and that her board-certified, treating psychiatrist testified that these physical reactions are characteristic of posttraumatic stress disorder.

CONCLUSION AND RELIEF REQUESTED

Plaintiff therefore urges this Court to grant Plaintiff leave to appeal and to order that interest run from commencement of the action.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF APPEALS

SHARDA GARG,

Plaintiff-Appellee/Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH,

Defendant-Appellant/Cross-Appellee,

and

LIFE CONSULTATION CENTER,

Defendant.

UNPUBLISHED
March 29, 2002

No. 223829
Macomb Circuit Court
LC No. 95-003319-CK

Before: Griffin, P.J., and Meter and Kelly, JJ.

PER CURIAM.

Defendant-appellant ("defendant") appeals by right, and plaintiff cross-appeals, from a judgment for plaintiff entered after a jury trial. Plaintiff, a woman of Indian descent, was refused eighteen promotions between 1983 and 1997 in her job as a therapist with defendant, and she sued on theories of racial discrimination and retaliation. The jury rejected the racial discrimination claim but awarded plaintiff $250,000 on the retaliation claim. We affirm.

Plaintiff based her retaliation claim on two separate theories: (1) that she was retaliated against for her 1981 action of slugging a supervisor, Donald Habkirk, in opposition to sexual harassment; and (2) that she was retaliated against for her 1987 action of filing a racial discrimination grievance against another supervisor, Kent Cathcart. Defendant contends that the trial court should have granted its motion for a directed verdict or for a judgment notwithstanding the verdict ("JNOV") with regard to both of these theories because plaintiff failed to establish all the elements of a retaliation claim.

We review de novo a trial court's decision to deny a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We "view

the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party." *Id.* "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261. Similarly,

> [a] trial court's ruling with respect to a motion for a directed verdict is reviewed de novo on appeal. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id.* at 643-644. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. *Id.* at 644. Neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99, 550 NW2d 817 (1996). [*Wickens v Oakwood Healthcare System*, 242 Mich App 385, 388-389; 619 NW2d 7 (2000), vacated in part on other grounds 465 Mich 53 (2001).]

MCL 37.2701, a section of the civil rights act, states, in relevant part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

In *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997), this Court stated:

> To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Plaintiff sufficiently established a jury question with regard to these elements by way of her evidence, concerning the slugging incident, that (1) she had observed Habkirk pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her; (2) around the same time, in 1981, plaintiff was walking along a hallway when she felt somebody touching her back; (3) she turned around and swung at this person; (4) the person was Habkirk, one of her supervisors; (5) after the slugging incident, Habkirk became cold toward her; (6) a coworker told her that Habkirk did not like her; (7) plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; (8) plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; (9) individuals less qualified than plaintiff received promotions while plaintiff did not; and (10) Habkirk remained in her chain of command throughout the years.

Viewing this evidence in the light most favorable to plaintiff, we conclude that reasonable jurors could differ with regard to whether plaintiff sufficiently established the elements of a retaliation claim. Indeed, reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently "raise[d] the specter" that she opposed a violation of the civil rights act. *Mitan v Neiman Marcus,* 240 Mich App 679, 682; 613 NW2d 415 (2000); see also *McLemore v Detroit Receiving Hosp & University Medical Center,* 196 Mich App 391, 396; 493 NW2d 441 (1992). Moreover, the different treatment plaintiff received after the slugging incident sufficed to establish causation. As noted in *McLemore, supra* at 396, a plaintiff may prove a retaliation claim using solely circumstantial evidence, and we may not second-guess the jurors' decisions. See *Wickens, supra* at 389. The trial court properly denied defendant's motion for a directed verdict or JNOV with regard to the slugging theory.

With regard to the second retaliation theory, plaintiff sufficiently established the elements of a retaliation claim by way of her evidence that (1) plaintiff filed a grievance alleging racial discrimination in June 1987; (2) Cathcart, a supervisor, knew about the grievance; (3) after filing the grievance, plaintiff failed to receive the next promotion that she sought, posted in December 1988, despite being qualified for the position; (4) plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; (5) individuals less qualified than plaintiff received promotions while plaintiff did not; (6) in 1994, plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons more senior to plaintiff received better offices; (7) in 1996, Cathcart made a statement disparaging to blacks; (8) Cathcart made another comment disparaging to Indians; (9) Cathcart reprimanded plaintiff but not others for minor infractions; (10) Cathcart ignored plaintiff in staff meetings and treated her poorly in the hallways; (11) in 1984 or 1985, Cathcart used the word "n-----" in referring to blacks; and (12) Cathcart remained in plaintiff's chain of command throughout the years.

Viewing this evidence in the light most favorable to plaintiff, we again conclude that reasonable jurors could differ with regard to whether plaintiff sufficiently established the elements of a retaliation claim. Defendant contends that plaintiff failed to demonstrate a causal connection between the adverse employment actions and the discrimination grievance because the first denial of a promotion occurred over 1½ years after the grievance. We agree with defendant that in discussing causation in retaliation cases, the case law emphasizes temporal proximity. See, e.g., *Howard v Canteen Corp,* 192 Mich App 427, 434; 481 NW2d 718 (1992), overruled in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265 (1999), and *McLemore, supra* at 397. However, one must keep in mind that according to her testimony, plaintiff was denied *the first promotion that she sought* after the filing of the grievance. Accordingly, viewing the evidence in the light most favorable to plaintiff, reasonable jurors could have concluded that a causal connection existed. The trial court properly denied defendant's motion for a directed verdict or JNOV with regard to the grievance theory.

Next, defendant argues that plaintiff's claims of retaliation with regard to denials of promotions occurring more than three years before her lawsuit should have been barred by the statute of limitations and that the trial court therefore should have granted defendant's motion for partial dismissal.[1] Defendant contends that the "continuing violations doctrine" cannot save

[1] We review de novo a trial court's decision with regard to a motion for summary disposition. (continued...)

these claims because each denial of a promotion was a discrete, identifiable act of potential discrimination that should have triggered plaintiff's awareness of the need to assert her rights or else risk losing them.

The Michigan Supreme Court discussed the continuing violations doctrine in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986). The *Sumner* Court discussed "subtheories" of the continuing violations doctrine. One involves "allegations that an employer has engaged in a continuous policy of discrimination" that has harmed or might harm both the plaintiff and other members of his class. *Id.* at 528. Another involves allegations of "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period." *Id.*

In the instant case, plaintiff did not allege a policy that potentially affected other members of her class. Indeed, her claim was more analogous to the "series of events" theory mentioned in *Sumner*. See *Phinney v Perlmutter*, 222 Mich App 513, 546-547; 564 NW2d 532 (1997). *Sumner* set forth the following factors to be used in evaluating a claim under this theory:

> The Fifth Circuit Court of Appeals has aptly described the factors to be considered in determining whether a continuing course of discriminatory conduct exists:
>
> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" *Berry v LSU Board of Supervisors*, 715 F 2d 971, 981 (CA 5, 1983). [*Sumner, supra* at 538.]

Here, while plaintiff's denials of promotions arguably had a certain degree of permanence, the denials were extremely similar in type. Moreover, they were frequently recurring and very numerous. Under these circumstances, we conclude that plaintiff's claims sufficiently met the *Sumner* definition of "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern . . ." *Id.* at 528. The trial court did not err in denying defendant's

On cross-appeal, plaintiff argues that the trial court should have ruled that interest on the total amount of plaintiff's damages began to run from the date of filing the complaint and not the date of the judgment, because none of the damages were "future damages" within the meaning of the statute awarding interest on future damages only from the date of judgment. This issue involves statutory construction and is therefore subject to de novo review. *Hinkle v Wayne County Clerk*, 245 Mich App 405, 413; 631 NW2d 27 (2001).

The jury awarded a lump sum of $250,000 to plaintiff. After trial, the parties disputed the amount of interest due on the award, because MCL 600.6013(1) allows for interest on "future damages" to accrue only from the date of the judgment and not from the date of filing the complaint. The trial court apportioned the damages as follows: $141,150 for future damages and $108,850 for past or present damages. The court awarded interest from the date of the complaint on the $108,850 and from the date of the judgment on the $141,250, concluding that because plaintiff alleged physical injuries, MCL 600.6013(1) mandated that interest run only from the date of the judgment on the future damages.

MCL 600.6013(1) states:

> Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in [MCL 600.6301].

MCL 600.6301 states:

> (a) "Future damages" means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering.
>
> (b) "Personal injury" means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm.

A clear and unambiguous statute must be enforced as written. See *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), and *Adrian School District v Michigan Public School Employees Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). The plain language of MCL 600.6301 defines "future damages" as damages resulting from bodily harm, sickness, or disease. The instant plaintiff testified that she suffered from headaches and high blood pressure as a result of the alleged discrimination.[3] This clearly constituted "bodily harm, sickness, or disease." Therefore, the trial court correctly calculated the interest from the date of

---

(...continued)

v Chrysler Corp, 445 Mich 109, 134-135; 517 NW2d 19 (1994).

[3] The jury was also instructed to award future damages for "physical pain and suffering."

the judgment on the future damages portion of the award.[4] We acknowledge that in *Phinney, supra* at 542, 562, and *Paulitch v Detroit Edison Co*, 208 Mich App 656, 661-663; 528 NW2d 200 (1995), this Court indicated that a plaintiff is entitled to prejudgment interest for future damages when the suit does not result from personal bodily injury. We find these cases sufficiently distinguishable from the instant case, however, because there was no indication in *Phinney* or *Paulitch* that the plaintiffs alleged physical manifestations resulting from discriminatory treatment.

Affirmed.

/s/ Richard Allen Griffin
/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly

---

[4] While it could be argued that *some* of plaintiff's damages that would accrue in the future were *purely* emotional and therefore did not fall within the definition of "future damages" in MCL 600.6301, plaintiff does not specifically address an apportionment issue or request alternative relief for apportionment on remand but merely argues that *none* of her damages fit within the MCL 600.6301 definition. Therefore, the issue of apportionment is deemed abandoned for purposes of appeal.

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

SHARDA GARG,

Plaintiff,

vs. File No. 95-3319-CK

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY, and LIFE CONSULTATION CENTER, a governmental agency and division of MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, jointly and severally,

Defendants.

_____/

OPINION

In this action plaintiff obtained a jury verdict in the amount of $250,000.00. In post trial motions heard by the Court to date, she has been awarded attorney fees as mediation sanctions and costs pursuant to the Elliot Larson Act. No attorney fees were granted pursuant to the Elliot Larson Act, nor were any costs awarded as mediation sanctions.

An issue yet to be decided by the Court is when does interest begin to run on the $250,000.00 jury award. Plaintiff contends it should commence as of the date of the filing of the Complaint while defendant submits interest, at least as to future damages, should commence as of the date the jury returned its verdict.

In an unpublished case, Dolores Hrlic and Leroy Hrlic v KMart Corporation, Fred Schlick, Beth Snell, and Joseph Sinischo, 159191,

the Court of Appeals clearly set forth that interest on future damages under a civil rights action commences the date of judgment. The plaintiff argues that none of the damages she sought and received were "future damages" and, hence, Hrlic, supra is inapplicable. However, the record indicates that in closing arguments plaintiff did ask for future wage loss (i.e., $52,185.00), pension loss benefits of $73,765.00 and emotional damages of $400,000.00. It does not appear what portion, if any, of the emotional damages were for the future.

Future damages, as noted, in Hrlic, supra and MCL 600.6013(1) include emotional harm resulting from bodily harm. In Hrlic, supra, the bodily harm was diverticulitis and peptic ulcer resulting from the tortious conduct. In this case, as indicated in defendant's brief, plaintiff did testify that she suffered from high blood pressure, stomach problems, erratic weight gain and loss, and sleeplessness. Additionally, plaintiff requested and was given SJI2d 50.02 which includes future damages for pain and suffering, mental anguish, etc. This being so, the Court concludes the emotional harm resulted from a bodily harm.

The difficulty, however, is trying to assess what portions of the emotional harm claimed are attributable to future damages. Regretfully, the jury was instructed pursuant to SJI2d 50.02 and the verdict furnished to them did not break down future damages. The Court recalls, this was requested by the defendant, but plaintiff argued against it and the Court agreed with plaintiff.

The Court is now asked to make, in effect, an equitable

determination as to what, if any, amount should be attributed to future damages.

Without making a judgment as to the correctness of the jury verdict vis-a-vis liability (which I am informed will be raised at a later time) suffice it to say that having sat through the trial and having observed the plaintiff testify, the Court is convinced she sustained emotional distress prior to the verdict and that she will continue to have some residual effects. However, she also struck me as a resilient person and, hence, I feel future emotional damages will not be as severe as in the past. It is the Court's determination that $15,000.00 be attributed to future emotional damages.

Further, I note plaintiff suggests in her brief that future wage loss and pension loss be considered as future damages and in that the Court concurs. To conclude, I find that the total sum attributable to future damages to be $141,150.00 and interest shall run on that amount commencing as of the date of judgment. On the balance, i.e. $108,850.00, interest shall run from the date of the filing of the Complaint.

In regard to the point of time that interest runs on the costs awarded under the Elliot Larson Act, interest will run from the date of the filing of the Complaint pursuant to MCL 600.3013(6). In regard to the mediation sanctions awarded, interest shall commence from the date of rejection of the mediation award. Finally, it is unclear to this Court what the plaintiff is seeking to accomplish in requesting the judgment provide that it retain

jurisdiction to award additional fees and costs, nor does it recall making such reservations. Hence, it is not to be included in the judgment. The Court recognizes that this case will undoubtedly find its way into the appellate process and should the appeals court find that further fees and costs should be awarded to the plaintiff, it may then be remanded by that court for a determination of an appropriate amount. Additionally, interest on the judgment by operation of law continues until payment. A judgment in accordance with this Opinion shall be entered forthwith.

ROLAND L. OLZARK

HON. ROLAND L. OLZARK, Visiting Judge

Dated : August 6, 1998

c: Allyn Ravitz, Attorney for Plaintiff
Karen B. Berkery, Attorney for Defendants

A TRUE COPY
Carmella Sabaugh
COUNTY CLERK
BY

STATE OF MICHIGAN
IN THE MACOMB COUNTY CIRCUIT COURT

SHARDA GARG,
Plaintiff,

v8.

Case No. 95-3319 CK
Judge Roland Olzark sitting for
Hon. George E. Montgomery

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,
Defendants.
_____/

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Attorney for Defendants
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Detroit, Michigan 48226
(313) 965-7929/Fax (313) 965-7403

ORDER OF JUDGMENT

At a session of said Court held in the
City of Mt. Clemens, Macomb County, Michigan
on _____, 1998

PRESENT: Honorable _____
Circuit Court Judge

A trial having been had in this cause, the jury having rendered a verdict in the amount of TWO HUNDRED FIFTY THOUSAND ($250,000.00) DOLLARS in favor of Plaintiff on April 23,1998, Plaintiff having filed a Motion for Mediation Sanctions, and a Motion for Elliot Larsen Civil Rights Act fees and costs, an evidentiary hearing having been held as to Attorney Fees and Costs, and the court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED THAT a Judgment be and is hereby entered in favor of the Plaintiff, Sharda Garg, against Macomb County Community Mental Health Services, a governmental agency of Macomb County, in the amount of $354,298.17 consisting of:

1) The jury award of $250,000. with interest to run on $108,850 of that award from the date of filing (7/21/95) which interest amount is an additional $23,399.15 as of 4/23/98 and with interest to run from the entry of judgment on $ 141,150. that portion of the award designated as future damages.
2) Costs under Elliott-Larsen $15,059.82 with interest to run from the date of filing (7/21/95) which interest amount is an additional $3,237.36 as of 4/23/98.
3) Attorney fees per mediation sanctions in the amount of $56,000 with interest to run from 9/24/96 (the date of rejection of mediation) which interest amount is an additional $6,601.84 as of 4/23/98.
4) No mediation costs.
5) No attorney fees under Elliott-Larsen

_____
Circuit Court Judge

GEORGE E. MONTGOMERY
CIRCUIT JUDGE

AUG 17 1998

Approved as to form

_____
Allyn Ravitz, Attorney for Plaintiff

_____
Karen Berkery, Attorney for Defendant

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY _____

AUG 25

STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

vs.

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a Governmental agency of MACOMB COUNTY,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 223829

Macomb Circuit No. 95-3319-CK

SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.
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KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
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NOTICE OF HEARING

TO: Kitch Drutchas Wagner DeNardis & Valitutti
By: Susan Healy Zitterman (P33392)
Karen B. Berkery (P38698)
One Woodward Ave., 10th Floor
Detroit, MI 48226-3499

YOU ARE HEREBY NOTIFIED that the Michigan Supreme Court will hear the within Application for Leave to Appeal as Cross-Appellant on Tuesday, June 4, 2002, or whenever it suits the Court.

Respectfully submitted,

SOMMERS, SCHWARTZ, SILVER
& SCHWARTZ, P.C.

By: _____

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PATRICK BURKETT (P33397)
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Dated: 5/9/02

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May 9, 2002

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
525 W. Ottawa, 2nd Floor
G. Mennen Williams Bldg.
Lansing, MI 48933

HAND DELIVERY

Re: Garg v Macomb County Community Health Services
Court of Appeals No. 223829
Macomb Circuit No. 95-3319-CK

Dear Mr. Davis:

Our messenger will present you with the original and eight copies of the following items:

a. Our Brief in Response to the Defendant's Supreme Court Application (Application filed: 4/18/02), which has Proof of Service attached;

b. Notice of Hearing, Application for Leave to Appeal as Cross-Appellant, Exhibits A-C, and Proof of Service.

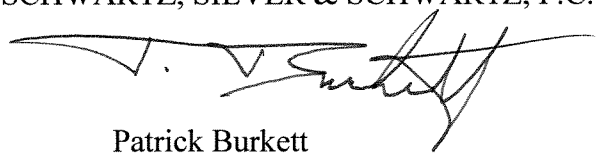
Our messenger will also present you with our check in the amount of $250 for the filing fee with respect to the Application for Leave to Appeal as Cross-Appellant.

Please return one copy of the Brief in Response, and one copy of the Notice of Hearing, Application for Leave to Appeal as Cross-Appellant, etc., to our messenger with your stamp appearing on those copies.

Thank you very much.

Very truly yours,

SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.



Patrick Burkett

Enclosures
cc: Monica Farris Linkner, Esq. (w/enc)
Susan Healy Zitterman, Esq. (w/enc)
Allyn Carol Ravitz, Esq. (w/enc)
Clerk, Macomb County Circuit Court (w/enc)
Clerk, Michigan Court of Appeals (Southfield) (w/enc)